87-1525

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PACIFIC FRUIT EXPRESS AND UNION PACIFIC FRUIT EXPRESS, JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,

Petitioner,

vs.

UNION PACIFIC FRUIT EXPRESS COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether §2, First of the Railway Labor Act, 45 U.S.C. §152, First, which requires carriers to "exert every reasonable effort to make and maintain agreements. . . and to settle all disputes, whether arising out of the application of agreements or otherwise", imposes a statutory duty upon a carrier to furnish to the union, upon request, information needed by the union to fulfill its statutory role as exclusive collective bargaining agent under the Railway Labor Act.

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PACIFIC FRUIT EXPRESS AND UNION PACIFIC FRUIT EXPRESS, JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,

Petitioner,

vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen Division, Transportation Communications International Union (hereinafter "Union" or "Petitioner") requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit rendered in this action on September 2, 1987.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen Division, Transportation Communica-

tions International Union,[1] Plaintiff-Petitioner and Union Pacific Fruit Express Company, Union Pacific Railroad Company and Union Pacific Motor Freight Company, Defendants-Respondents.

OPINIONS BELOW

The order and judgment (unpublished) of the United States District Court for the District of Idaho appear in the Appendix at A-1. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 826 F.2d 920 and appears in the Appendix at A-6. The order of the United States Court of Appeals for the Ninth Circuit filed December 4, 1987, denying the Union's Petition for Rehearing En Banc appears in the Appendix at A-14.

CONCISE STATEMENT OF THIS COURT'S JURISDICTION

On May 15, 1984, the Union filed a complaint in the United States District Court for the District of Idaho. The complaint alleged, *inter alia,* that 225 carmen represented by the Union and employed by UPFE[2] had been furloughed from UPFE's Nampa facility. The Union alleged that as the statutory exclusive bargaining representative of the furloughed employees, the Union had requested UPFE and UPRR to disclose certain infor-

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[1] The plaintiff below was styled as Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO-CLC. After this case was submitted to the Court of Appeals, the Brotherhood Railway Carmen merged with and became a division of the Transportation Communications International Union (formerly BRAC). Petitioner's name, as set forth above, reflects the present name of the plaintiff below.

[2] Respondents will be designated herein as they were designated in the Complaint: Union Pacific Fruit Express Company as "UPFE", Union Pacific Railroad Company as "UPRR" and Union Pacific Motor Freight Company as "UPMF."

mation to the Union pertaining to the furloughed employees' rights under the 1964 Mediation Agreement. The Union alleged that Respondents had refused to disclose the requested information. The Union alleged Respondents' refusal to disclose the requested information was a violation of Respondents' statutory duties, pursuant to 45 U.S.C. §152, First, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . ." The Union requested that the court issue a permanent injunction compelling Respondents to disclose the requested information to the Union. The Union asserted the district court had subject matter jurisdiction by virtue of 28 U.S.C. §1337.

Subsequent to filing answers to the complaint, all three Respondents moved for summary judgment. The Union then filed a cross motion for partial summary judgment against Respondents UPFE and UPRR.

On September 23 and 25, 1986, respectively, the district court entered its order and judgment granting the Respondents' Motion for Summary Judgment and denying the Union's Motion for Partial Summary Judgment. The Union thereafter timely filed its Notice of Appeal on October 7, 1986.

The Ninth Circuit Court of Appeals, by its opinion dated September 2, 1987, held that the district court had subject matter jurisdiction to consider and rule upon the Union's claim that Respondents violated 45 U.S.C. §152, First by refusing to disclose to the Union the information which the Union had requested. The Ninth Circuit Court of Appeals, however, also interpreted 45 U.S.C. §152, First as not imposing a statutory duty upon any of the Respondents to disclose the information the Union had requested. The Ninth Circuit Court of Appeals, therefore, affirmed the district court's order and judgment holding that Respondents had not violated 45 U.S.C. §152, First when Respondents refused to disclose the requested information.

The Union timely filed its Motion for Rehearing En Banc by the Ninth Circuit Court of Appeals on September 15, 1987. By order dated and entered on December 4, 1987, the Union's Motion for Rehearing En Banc was denied.

This Petition for a Writ of Certiorari was timely filed within 90 days of the entry by the Ninth Circuit Court of Appeals of the order denying the Union's Motion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case arises under the Railway Labor Act, specifically 45 U.S.C. §152, First (1982), which provides:

> **"General duties**
>
> **First. Duty of carriers and employees to settle disputes.** It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

Most of the facts pertaining to the issue presented in this Petition were summarized by the Court of Appeals which stated:

> Union Pacific [UPFE] is a carrier within the meaning of 45 U.S.C. §151 First (1982). The union is a railway labor union and a representative of Union Pacific's [UPFE] carmen within the meaning of 45 U.S.C. §151 Sixth (1982). In 1980, Union Pacific [UPFE] began a series of layoffs of railway carmen at its Nampa, Idaho repair facility. The

> Union contends that Union Pacific's [UPFE] layoffs amounted to an abandonment of the Nampa facility, and that furloughed Nampa carmen are therefore entitled to income protective benefits under a 1964 agreement between Union Pacific [UPFE] and the carmen. Union Pacific [UPFE] denies that it abandoned the Nampa facility and contends that a decline in rail traffic and increased competition made the layoffs necessary. Both sides agree that this underlying dispute is a "minor dispute" under the Railway Labor Act and that it cannot be litigated in court. See 45 U.S.C. §153 First (i) (1982); *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986).
>
> In 1983 and 1984, union officials asked Union Pacific [UPFE] to supply financial information to substantiate the claim that a decline in business caused the Nampa layoffs. Union Pacific [UPFE] refused to supply the requested information.

Pacific Fruit Express and Union Pacific Fruit Express, etc. v. Union Pacific, 826 F.2d 920, 921 (9th Cir. 1987) [Bracketed Material Supplied].

Expanding upon these summarized facts, the Mediation Agreement of September 25, 1964 provides that employees who are deprived of employment due to certain operational changes made by the carrier, including abandonment of facilities or transfer of work, would be entitled to income protective benefits. The grounds available to the carrier in defense of a claim for protective benefits include (1) denial that the furloughs were caused by a covered operational change or (2) assertion that the furloughs were caused by a decline in business. The record before the Court of Appeals demonstrated that the primary disputed issue of fact in the *underlying contract dispute* was what had *caused* UPFE to furlough the 225 UPFE Nampa carmen and close the Nampa heavy repair facility. It had been established that UPFE and UPMF were wholly owned sub-

sidiaries of UPRR. The Union contended that Respondents had voluntarily undertaken a series of intentional business decisions designed to drastically reduce UPFE's participation in supplying refrigerated railroad freight cars to haul perishable food products. The Union also contended Respondents had acted to divert this perishable food hauling business from UPFE and, instead, to conduct this same business by utilizing refrigerator trailers suitable for transport on flat cars and supplied by UPRR and UPMF. The Union contended that these business decisions had caused the furlough of the Nampa carmen and the closure of the Nampa facility. The Union, therefore, contended that the 225 carmen had been furloughed as a result of changes in operations effected by the carrier in anticipation of the closing of the Nampa repair facility and were entitled to protective benefits under the 1964 Mediation Agreement. UPFE and UPRR, on the other hand, contended that such business decisions, the furlough of the Nampa carmen, and the closure of the Nampa heavy repair facility were responsive to and caused by economic considerations, to-wit: deregulation, increased competition, and a decline in perishable transportation business. UPFE and UPRR, therefore, contended none of the furloughed carmen were entitled to protective benefits. The determination of whether or not any of the carmen would receive protective benefits, therefore, hinged upon whether the Union's (or alternatively Respondents') theory concerning the cause of Respondents implementing their business decisions, furloughing the carmen, and closing the Nampa repair facility was factually correct.

The answer to the question of what had motivated UPFE and UPRR to undertake these business decisions, furlough the Nampa carmen and close the Nampa repair facility was uniquely within the knowledge of Respondents and not known to the Union. This was the reason for the Union requesting the information referred to in the Court of Appeals opinion. It was also established in the record before the Court of Appeals that there was neither contractual nor administrative machinery by which

the Union could compel any of the Respondents to disclose any of the requested information at any stage of the dispute resolution procedure. Moreover, it was established on the record before the Court of Appeals and is abundantly obvious that the requested information was vitally important to the Union's representation of the furloughed carmen and to a fair determination of whether the furloughed carmen were entitled to protective benefits under the 1964 Agreement.

REASONS FOR GRANTING THE WRIT

I.

PRELIMINARY STATEMENT

This petition presents extremely significant questions of interpretation of the Railway Labor Act, 45 U.S.C. §151 et seq.: whether the statutory duty "to exert every reasonable effort to make and maintain agreements. . . . and to settle all disputes, whether arising out of the application of agreements or otherwise. . .", §2, First of the RLA (45 U.S.C. §152, First), encompasses a duty on the part of the carrier to furnish to the union, upon request, information required by the union to carry out its statutory role as exclusive collective bargaining agent under the RLA. The statutory right of a union to request and receive such information and the corresponding statutory duty of the employer to furnish such information under the National Labor Relations Act (NLRA) has long been recognized by this Court and has long been routinely enforced by the NLRB and Courts of Appeals. As will be shown below, this Court has considered this duty to be essential to the proper functioning of federal labor law in industries covered by the NLRA. By contrast, however, the opinion of the Court of Appeals in the instant case holds that the statutory commands of §2, First of the RLA do not require a carrier to furnish information needed by the union to administer and enforce existing agreements.[3] If allowed to stand, the decision of the Court of Appeals will mean that RLA carriers have no duty to furnish information to substantiate any factual claim made by them in dealing with the union, even though such disclosure has been deemed by this Court to be

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[3] To petitioner's knowledge, the only other decision addressing this issue is *Burlington Northern Joint Protective Board v. Burlington Northern Railroad Co.*, 822 F.2d 810 (8th Cir. 1987). In that case, the court held that it was without subject matter jurisdiciton to require the carrier to furnish the requested information. A petition for a writ of certiorari seeking review of that decision is pending in this Court in Case No. 87-1177.

essential to the functioning of the system of industrial self government established by the NLRA. This diminishes the utility and effectiveness of the minor dispute and arbitration process for RLA unions and employees to the vanishing point in complex contract disputes especially when, as here, the information essential to resolving the dispute is exclusively within the possession of the carrier, and will contribute to the increase in fair representation/contract breach litigation in the federal courts. These are important issues which should be addressed by this Court. The resolution of these issues by the Court of Appeals is inconsistent with prior decisions of this Court. See Rule 17.1(c) of the Rules of the United States Supreme Court. The writ should be granted.

II.

§2, First Of The Railway Labor Act (45 U.S.C. §152, First) Imposes Upon A RLA Carrier The Duty To Furnish To RLA Unions, Upon Request, Information Required By The Union To Carry Out Its Statutory Duties As Exclusive Collective Bargaining Agent.

§2, First of the RLA (45 U.S.C. §152, First) imposes upon RLA carriers and unions alike the statutory duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of agreements or otherwise. . .".

In almost identical language, §204 (a)(1) of the Labor Management Relations Act (LMRA) (29 U.S.C. §174 (a)(1), imposes upon employers and unions covered by the National Labor Relations Act the duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours and working conditions, . . .".

In construing the statutory language requiring NLRA employers and unions to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and

working conditions," this Court, in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 49, 153-154, 76 S.Ct. 753, 755-56 (1956), held:

> "[2,3] We think that in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreement would result. Section 204 (a)(1) of the Act admonishes both employers and employees to **"exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions** * * *." In their effort to reach an agreement here both the union and the company treated the company's liablity to pay increased wages as highly relevant.
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> * * * *
>
> [4, 5] Good-faith bargaining necessarily requires that claims made by either bargainer should be **honest** claims. This is true about an asserted inability to pay an increase in wages. **If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.**

(Emphasis suppled). *Truitt*, of course, involved a plea of poverty made by the employer during negotiations for a collective bargaining agreement. In the instant case, Respondents' claim that the furloughs were caused by a decline in business and that benefits under the 1964 Agreement were, therefore, not payable is obviously strikingly similar to the plea of poverty in *Truitt*.

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565 (1967), this Court extended the *Truitt* case and held that the employer's statutory duty, upon request, to furnish information needed by the union to carry out its role as exclusive collective bargaining representative, included information sought by the

union in connection with the enforcement and administration of existing agreements through grievance and arbitration procedures. In *Acme,* this Court rejected the employer's claim that requiring the employer to furnish pertinent information would require the court to construe the collective bargaining agreement, thereby improperly infringing upon the jurisdiction of the arbitrator. This Court specifically held that enforcing the statutory duty to furnish information in the context of a dispute subject to arbitration was not only proper but "was in aid of the arbitral process," 385 U.S. at 483, 87 S.Ct. at 659, and *essential* to the proper functioning of arbitration. The duty to furnish information is extremely well established as to NLRA employers as one part of the employer's general duty to bargain in good faith, and there is a considerable body of case law involving the details of its application.

Petitioner's argument in this case is simple and straight forward. If the statutory command of §204 (a)(1) of the LMRA, that NLRA employers and unions shall "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, . . ." means that NLRA employers, as part of their duty to bargain in good faith, have a statutory duty to furnish information requested by the union, as set forth above, then the virtually identical statutory command of §2, First of the RLA, that RLA carriers and unions shall "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" should be construed in a similar fashion, thereby imposing a similar statutory duty upon RLA carriers to furnish pertinent information to the union required by the union to carry out its statutory duties as exclusive collective bargaining agent. Petitioner respectfully submits that when, as here, Congress has used virtually identical language in two different acts relating to labor relations, such identical language should be accorded similar construction by this Court in each Act. In *Northcross v. Board of Education of the Memphis City Schools,* 412 U.S. 427, 93 S.Ct. 2201 (1973) (per curiam), this Court held that statutes

which track each other in wording and share a common *raison d'etre* should be interpreted *pari passu*. That is the situation in this case. There is no principled basis for doing otherwise in this case.[4]

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[4] Petitioner submits that it is not a sufficient answer to this argument to simply invoke the well known view of this Court that parallels between the NLRA and RLA should be drawn with care, and that the scope of the duties created under each act will not necessarily be identical. It must also be kept in mind that this Court and the Courts of Appeals have frequently looked to the NLRA for aid in construing the RLA, or the converse. For instance, in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398 (1964), this Court held that displacement of a labor force, by means of contracting out work, was a change in "terms and conditions of employment," as that term is used in the National Labor Relations Act. In so holding, this Court relied on its previous decision in the Railway Labor Act case of *Order of R.R. Telegraphers v. Chicago & N.W.R.R.,* 362 U.S. 330, 80 S.Ct. 761 (1960), in which this Court had previously held a similar change in operations to constitute a change in "working conditions" as that term is used in §6 of the Railway Labor Act. See the discussion on this point in *United States Industrial Workers of the Seafarers International Union v. Board of Trustees,* 351 F.2d 183, 190-191 (5th Cir. 1965) (RLA). Similarly, the duty of fair representation imposed upon unions was first enuciated by this Court in *Steele v. Louisville & Nashville Railroad,* 323 U.S. 192, 65 S.Ct. 226 (1944). In that Railway Labor Act case, this Court relied in part on provisions of the National Labor Relations Act. See 323 U.S. at 200, 65 S.Ct. at 231. Later this Court relied on the *Steele* case under the RLA in imposing the same duty of fair representation under the National Labor Relations Act in *Ford Motor Co. v. Huffman,* 345 U.S. 330, 73 S.Ct. 681 (1953). Most recently, those federal courts of appeals to consider the question to date have consistently applied the six-month statute of limitations contained in §10(b) of the National Labor Relations Act to hybrid suits for breach of collective bargaining agreements and breach of the duty of fair representation under the Railway Labor Act. *E.g., Welyczko v. U.S. Air, Inc.,* 733 F.2d 239 (2d Cir. 1984); *Sisco v. Consolidated Rail Corporation,* 732 F.2d 1188 (3rd Cir. 1984); *Hunt v. Missouri Pacific Railroad,* 729 F.2d 578 (8th Cir. 1984); (per curiam); *Barnett v. United Air Lines, Inc.,* 738 F.2d 358 (10th Cir. 1984). See also *International Brotherhood of Electrical Workers v. Foust,* 441 U.S. 42, 99 S.Ct. 2121 (1979); and *Railroad Trainmen v. Toledo, P. & W.R. Co.,* 321 U.S. 50, 61 n.18, 64 S.Ct. 413, 419 n.18 (1944), for other examples of this Court looking to the NLRA for aid in constru-

The Court of Appeals relied heavily on the RLA policy strongly favoring arbitration and held that requiring Respondents to furnish information "would place the Courts at the heart of the bargaining process whenever either side in a railway labor dispute sought information about the other." 826 F.2d at 923. This would appear to be a concern that requiring disclosure would somehow weaken the role of arbitration or in some manner invade or infringe upon the jurisdiction of arbitration boards. Yet, the NLRA has an equally strong policy favoring arbitration as a means of resolving industrial disputes, and this Court has firmly rejected the argument that enforcing the duty to furnish information in any manner weakens that policy. To the contrary in *Acme,* this Court held that enforcing the statutory duty to furnish information did not invade or infringe upon the jurisdiction of the arbitrator, but was in aid of arbitration and essential to its proper functioning.[5]

The opinion of the court below offers no reason why that reasoning is not applicable to the instant case. Although there are minor procedural variations between arbitration under the RLA and under the NLRA, the essentials of the process remain

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ing the RLA. In those cases in which this Court has emphasized that certain duties and rights under the RLA and NLRA were not identical or coextensive, *see, e.g., First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 686 n.23, 101 S.Ct. 2573, 2585 n.23 (1981); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383-84, 89 S.Ct. 1109, 1118 (1969), this Court was invited to find parallels between the two acts but that invitation was not supported by the presence of virtually identical statutory language in each act, as is the union's argument in this case.

[5] In enforcing the duty to furnish information, the court would not interpret the agreement. To the contrary, it would refer to the agreement only to the extent necessary to determine whether the information requested was relevant, under a broad-discovery type standard, to the underlying dispute, the merits of which would be resolved by the arbitrator.

the same. Arbitration is arbitration. If the duty to furnish relevant information is essential to the proper functioning of arbitration in the many and diverse industries covered by the NLRA, it is also essential in the rail industry under the RLA. The arbitrator cannot properly apply the agreement to a dispute unless the facts are adequately presented. In this case, the crucial factual issue for arbitration under the 1964 Mediation Agreement is the reason for or cause of the furloughs and the validity of the Respondents' claim that the furloughs were caused by a decline in business. The economic data and other information pertinent to this issue which has been requested by the union is exclusively in the hands of Respondents. Arbitration cannot serve its intended function in the instant case because the information necessary to a resolution on the merits is exclusively in the hands of Respondents, and the Respondents have suppressed the information.

In addition, the Union respectfully submits that the mandatory dispute resolution procedures and fundamental policies of the RLA point even more clearly to the propriety of construing §2, First of the RLA to impose a statutory duty to disclose requested information under this Act than do the statutory provisions of the NLRA. Under the RLA, the carrier and Union are not only under a duty "exert every reasonable effort . . . . to settle all disputes" but are also under a positive duty to consider and, *if possible,* decide all disputes in conference prior to arbitration. *See,* 45 U.S.C. §152, Second. In this regard, there is no statutory provision of the NLRA corresponding to 45 U.S.C. §152, Second and commanding the parties to settle their dispute "if possible," before proceeding to arbitration. The RLA, therefore, demands that carriers and unions exert every reasonable effort and exhaust all possibilities in order to resolve an extant dispute. Insofar as the Court of Appeals opinion appears to be based upon the assumption that the RLA demands less of carriers and unions than the NLRA does of their counterparts, the opinion is clearly contradicted by the express language of the Act.

Moreover, in the context of the instant case it is readily apparent that the Respondents' steadfast, repeated refusal to disclose the requested information made it impossible to settle the dispute during the mandatory §2, Second conferences. The Union, of course, had already submitted the evidence available to it which supported the Union's position the furloughed carmen were entitled to the protective benefits under the 1964 Agreement. UPFE and UPRR, in response thereto, submitted some rather superficial, conclusory statistics and fragments of information which they contended "conclusively" demonstrated none of the furloughed carmen were entitled to any protective benefits. When the Union sought to dig deeper and obtain additional information and the data upon which the Respondents conclusory statistics were based, the Union was denied access to the requested information. Under these circumstances, how could the Union — consistent with its duty of fair representation to its hundreds of furloughed members — reach any agreement with the Respondents which would settle this dispute?[6] Certainly, the Union could not accept Respondents'

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[6] Since the information the Union requested has never been disclosed, it is impossible for the Union to know what course the dispute would have taken had the information it requested been provided. Three scenarios can, however, at least be outlined.

Assuming the requested information had supported Respondents' position that all (or even some) of the hundreds of carmen had been furloughed because of a decline in business, the Union could then — consistent with its duty of fair representation — have made an informed decision to not pursue any (or some) of the claims.

Assuming the information conclusively refuted the Respondents' position, the carrier might have been pressured to settle all (or some) of the claims immediately. The "pressure" would have been for the Respondents to avoid the continuing accrual of backpay.

Alternatively, the requested information may have been inconclusive on the issues, thus leaving the parties to either negotiate — or arbitrate — as to the legal effect of its meaning.

By refusing to disclose the requested information, however, Respondents prevented each and every one of the above possible settlements or resolutions of the dispute.

position and superficial, conclusory explanations at face value. The only other alternative, therefore, was to obtain the necessary additional information, but Respondents foreclosed this route by refusing to disclose the information. As a direct result of Respondents' refusal to disclose the requested information, settlement of the underlying dispute was rendered impossible. This certainly runs counter to this Court's admonition in *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570, 91 S.Ct. 1731 (1971), that §2, First is intended to prevent an RLA disputant from engaging in conduct intended to block or avoid settlement of a dispute. It also runs counter to the mandates of Section 2, Second which requires the parties to resolve their disputes — if possible — during the initial conferences.

Even apart from the foregoing, the position of Respondents that they have no duty whatsoever to furnish the information requested by the union cannot be accepted. The conduct of Respondents which made conclusory factual assertions to the Union, which were self-serving from the viewpoint of the Respondents' interests, followed by a steadfast refusal to comply with the Union's request for underlying data which could be used to verify the validity of Respondents' assertions is, on its face, inconsistent with and contrary to the statutory command of §2, First to "exert every reasonable effort to make and maintain agreements and settle all disputes. . ." Such conduct obviously falls very, very far short of "exerting every reasonable effort."

This Court must recognize that acceptance of the Respondents' position that they can continue to suppress or withhold requested information relevant to the merits of a dispute such as the instant one condones, indeed entices and invites, Respondents and other carriers to breach such agreements. If the union lacks access to information necessary to police and enforce its agreements and the carrier cannot be compelled to disclose the requested information, the carrier can violate agreements with little or no risk. Such a result is not consistent with the policies of the RLA and also subverts the dispute resolution procedures of the Act.

The Court below also relied upon the fact that no agency comparable to the National Labor Relations Board exists under the RLA. This suggests that the Court might well have agreed that §2, First requires the carrier to furnish information if some person or some agency other than the courts would have initial responsibility for enforcement of the duty. This institutional concern as to whether recognizing that §2, First imposes an enforceable duty of disclosure would increase the work load or burden of the federal courts is understandable. However, and with respect to the Court of Appeals, the union strongly contends that the legitimacy of that concern as an institutional matter should not, and must not, cause the courts, in construing the Acts of Congress, to permit those concerns to displace the language used by Congress and the interpretation already placed on that language by this Court.

In *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 578, 90 S.Ct. 1731, 1735 (1971), this Court explicitly held that §2, First of the RLA imposed legal obligations, and was not merely a statement of "policy" and stated:

> "We think it plain that Section 2, First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis."

402 U.S. at 578, 91 S.Ct. at 1735.

This Court also squarely held that the federal courts were to be the means by which the duties of §2, First would be enforced, holding:

> "In light of these considerations, we think the conclusion inescapable that Congress intended the enforcement of Section 2, First to be overseen by appropriate judicial means rather than by the mediation board."

Id. at 582, 91 S.Ct. at 1737 (bracketed material and emphasis supplied).

This Court has also stated that §2, First is the "heart" of the Railway Labor Act. *Brotherhood Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-79, 89 S.Ct. 1109, 1115 (1969).

This Court has also clearly held that the statutory duties imposed by §2, First apply generally to all disputes between carriers and unions under the RLA, both those characterized as "major" (dealing with the formation or attempts to form collective bargaining agreements) and those characterized as "minor" (dealing with application and interpretation of those agreements and therefore subject to arbitration before appropriate adjustment boards or public law boards). *Elgin J. & E. Ry. Co. v. Burley*, 325, 711, 729, 65 S.Ct. 1282, 1293 (1945).

In *Chicago & Northwestern, supra,* this Court explicitly held, relying in part on legislative history (See 402 US at 576-578, 91 S.Ct. 1731, 1735; Hearings on Railroad Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 40-41, 66, 84-85, 91 (1926)), that the specific content of the duties imposed by §2, First was to be developed and enforced by the federal courts in a common law, case by case fashion. The RLA, unlike the NLRA, did not create on administrative agency, such as the NLRB, to enforce the substantive rights and duties of the parties as set forth by Congress in its legislation, because the responsibility for enforcing the statutory commands of the RLA was given to the courts by the Congress. If the courts deny this responsibility, the statutory duties imposed by §2, First will be without meaning, for lack of any forum in which they can be enforced. The various Adjustment Boards created by the RLA (See §3 of the RLA, 45 U.S.C. §153) are empowered only to interpret and apply agreements, and their jurisdiction does not extend to interpretation of the enactments of Congress. *C. f., Alexander v. Gardner Denver Co.*, 415 U.S. 36, 53-55, 94 S.Ct. 1011, 1022 (1974) (arbitration decision based on arbitrator's view of requirements of enacted legislation rather than interpretation of

agreement exceeds scope of submission and will not be enforced).

Petitioner's statutory claim in this case is thus within the purview of the federal courts because the duty to furnish information is a substantive matter governed by the RLA - and the existence of and enforcement of that duty cannot be resolved by interpretation of a collective bargaining agreement. *Railroad Trainmen v. Howard,* 343 U.S. 768, 774, 72 S.Ct. 1022, 1025 (1951); *Steele v. Louisville N. & R. Co.,* 323 U.S. 192, 65 S.Ct. 226 (1944); *Railway Labor Executives' Assoc. v. Boston & Maine Corp.* 808 F.2d 150 (1st Cir. 1986). *cert. den.* ____ U.S. ____, 108 S.Ct. 102 (1987). Only the federal courts can interpret and enforce §2, First.

Further, the notion that the courts will avoid involvement in resolving the merits of labor disputes by refusing to require disclosure of information is illusory. To deny the union access to relevant information in cases such as the instant case, when numerous employees have literally lost their jobs, will inevitably increase the incidence of major hybrid fair representation/contract breach litigation by employees whose claims were either not presented by the union to arbitration due to lack of proof, or were denied by arbitrators due to lack of proof. The federal courts unhesitatingly accept jurisdiction of these fair representations/contract breach cases, although they clearly involve the very merits of matters subject to binding arbitration, based on the statutory duty of fair representation recognized by this Court under both the RLA and NLRA.

Moreover, anomalous situations will arise in such litigation because, ironically, the aggrieved employees will then have available the full panoply of discovery procedures under the Federal Rules of Civil Procedure to employ against both carrier and union. If the decision of the court below stands, evidence will be discovered and presented to juries in fair representation/contract breach suits to which the union was denied access in arbitration. If such evidence demonstrates the employer has

breached the contract, will courts or juries follow the impulse to do justice to the individuals employees by holding the employer liable? If so, courts and juries can do so only by also finding against the union to which the Court of Appeals opinion would deny relevant information, since this Court has held that *both* the claim of breach of duty of fair representation against the union and the claim of contract breach against the employer must be proved before the employee will be entitled to recover as against either. See *Hines v. Anchor Motor Freight Company,* 424 U.S. 554 (1976). It would obviously be improper to hold the union liable for failure to obtain or present information to which the courts denied it access. This means that cases will arise in which contract breaches by employers will be clearly revealed by discovery in such suits, but in which the employees will have no remedy against the employer because the union cannot be held liable in that it could not obtain in the grievance and arbitration process the same evidence obtained by the employees in the discovery process. The resolution of the merits of these contractual disputes in jury trials is most time consuming, to say the least.[7]

Further, in giving primary jurisdiction of contractual grievances or minor disputes under the RLA to adjustment boards, on the premise that such tribunals possessed specialized knowledge about such disputes, Congress surely did not intend such disputes to be repeatedly resolved on the merits by lay juries in fair representation/contract breach suits. The policy of reaching a *final* and expeditious resolution of such disputes

---

[7] By contrast, enforcing a duty to furnish information would not impose the burdens of lengthy jury trials upon the courts. It should be noted that the Courts of Appeals already routinely consider duty to furnish information questions on petitions for review from decisions of the National Labor Relations Board. In the RLA context, once the duty is established, such disputes could be routinely and expeditiously resolved by magistrates, just as many discovery disputes are now resolved.

through arbitration before adjustment boards would be much better served by requiring disclosure of requested information before arbitration. In that way, adjustment boards could meaningfully resolve disputes upon an adequate record and their decisions would accordingly be less vulnerable to repeated and time consuming challenges - and those disputes would be finally decided by the tribunals intended by Congress and not by lay juries. To deny unions this essential information, especially in complex disputes such as in this case, does not promote arbitration as a method of final expeditious resolution of industrial disputes in the railway industry. This Court should grant certiorari and reverse the judgment of the Court of Appeals.

CONCLUSION

Accordingly, petitioner respectfully submits that this Court should grant certiorari in this case because the opinion of the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, that is the question of whether an enforceable duty to furnish relevant information exists under Section 2, First of the Railway Labor Act. This question has also been decided by the Court of Appeals in a way which conflicts with prior decisions of this Court, including notably *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 91 S.Ct. 1731 (1971); *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S.Ct. 753 (1956); and *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 87 S.Ct. 565 (1967). See Rule 17.1 (c) of the Rules of the United States Supreme Court. For these reasons, it is most respectfully urged that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 84-1177

Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada,

Plaintiff,

v.

Union Pacific Fruit Express Company, a corporation, Union Pacific Railroad Company, a corporation, and Union Pacific Motor Freight Company, a corporation,

Defendants.

JUDGMENT

(Filed Sept. 25, 1986)

Based upon the Order of this court entered September 23, 1986, and the issues having been duly determined,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of Defendants Union Pacific Fruit Express Company, Union Pacific Railroad Company and Union Pacific Motor Freight Company.

DATED this 25 day of September, 1986.

/s/ Harold L. Ryan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 84-1177

Pacific Fruit Express and Union Pacific
Fruit Express Joint Protective Board,
Brotherhood Railway Carmen of the
United States and Canada,
Plaintiff,

v.

Union Pacific Fruit Express Company,
a corporation, Union Pacific Railroad Company,
a corporation, and Union Pacific Motor
Freight Company, a corporation,
Defendants.

ORDER

(Filed Sept. 23, 1986)

INTRODUCTION

On May 15, 1984, plaintiff filed a Complaint against defendants seeking an order from this court compelling defendants to furnish certain business information to be used in future arbitration proceedings between the parties. The underlying dispute in this action stems from a conflict over the interpretation of a 1964 mediation agreement entered into between the parties. Plaintiff Union contends that Defendant Union Pacific Fruit Express Company (UPFE) is required to provide furlough allowances to employees who were working at a heavy repair facility in Nampa, Idaho, that closed down in December of 1982. The parties subsequently filed cross-motions for summary judgment on the discovery issue. The court conducted a hearing on the motions for summary judgment on September 15, 1986.

DISCUSSION

The sole issue that must be decided by this court is whether plaintiff is entitled to pre-arbitration discovery in federal court. It is uncontroverted by the parties that the dispute as to whether the employees were entitled to furlough allowances is under the exclusive jurisdiction of a special board of adjustment established pursuant to 45 U.S.C. § 153-Second. This provision allows carriers and unions to mutually agree upon the establishment of an adjustment board to decide disputes between the parties. The 1964 mediation agreement entered into between the parties gives the special adjustment board exclusive jurisdiction over disputes between the parties growing out of grievances concerning the interpretation or application of the agreement. Plaintiff admits that the 1964 agreement does not provide for pre-arbitration discovery. What this court must decide is whether it can grant discovery concerning matters over which it lacks subject matter jurisdiction.

Defendants have cited the court to two decisions which are presuasive to the issue at hand. *Burlington Northern Joint Protective Board, et al. v. Burlington Northern Railroad Co., et al.*, 86-3458-CV-8-4 (W.D.Mo. September 4, 1986), and *Brotherhood of Railway Carmen v. Pacific Fruit Express Co.*, 651 F.2d 651 (9th Cir. 1981), stand for the proposition that a federal court cannot grant a party's request for discovery if it has no jurisdiction over the underlying dispute. Adopting the holdings in these two decisions, the court finds it has no jurisdiction to grant plaintiff's discovery request because it has no jurisdiction to determine the party's rights as to the underlying contract dispute. This holding is consistent with established federal policy which favors arbitration before an adjustment board. *See Burlington Northern Joint Protective Board, et al. v. Burlington Northern Railroad Co., et al.*, 86-3458-CV-8-4 (W.D.Mo. September 4, 1986) at 4.

In support of its position, plaintiff directs this court to 45 U.S.C. § 152-First, which provides in part: "It shall be the duty

of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes . . . ." Plaintiff would have the court read this statute to require defendants to furnish to plaintiff upon request all relevant discovery material. Plaintiff cites the court to the United States Supreme Court decision in *Chicago and North Western Railway Co. v. United Transportation Union,* 402 U.S. 570 (1971), where it was held that the Section 152 duties were enforceable by injunction in federal court.

The court does not agree with plaintiff's reading of 45 U.S.C. § 152-First. Plaintiff cites no Railway Labor Act (RLA) authority to support its position. Indeed, no party has ever been granted a statutory right to discovery under Section 152-First of the RLA. The Supreme Court case cited by plaintiff involved a threatened strike by the defendant Union, threatening the very existence of the collective bargaining agreement entered into between the parties. In the instant case, there is no indication that defendants will not settle this dispute pursuant to the 1964 agreement, an agreement, which expressly provides for no pre-arbitration discovery. The court will not read into a statute procedures that have never been granted to a party under the Railway Labor Act.

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment should be, and is hereby, DENIED as being moot.

IT IS FURTHER ORDERED that plaintiff's Motion to Compel Discovery should be, and is hereby, DENIED as being moot.

DATED this 23rd day of September, 1986.

/s/ Harold L. Ryan
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-4235

D.C. No. CV84-1177-R

Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada,
Plaintiff-Appellant,

v.

Union Pacific, Union Pacific Express Company, a corporation; Union Pacific Railroad Company; Union Pacific Motor Freight Company, a corporation,
Defendant-Appellee.

OPINION

Argued and Submitted
June 3, 1987—Seattle, Washington

Filed September 2, 1987

Before: Cecil F. Poole, Warren J. Ferguson and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

Appeal from the United States District Court for the District of Idaho
Harold L. Ryan, District Judge, Presiding

SUMMARY

Railroads

Appeal from grant of summary judgment. Affirmed.

Appellant Brotherhood of Railway Carmen (the union) contends that appellee Union Pacific's layoffs of railway carmen amounted to an abandonment of repair facility. These workers were therefore entitled, the union claims, to income protective benefits under an agreement with appellee. Appellee denied the alleged abandonment and contends that a decline in traffic made the layoffs necessary. Both sides agree that the underlying dispute is a minor dispute under the Railway Labor Act (Act) and that it cannot be litigated in court. Union officials asked the appellee to supply financial information to substantiate their claim. Appellee refused. The union filed suit in district court, arguing that the refusal to disclose violated Section 2 First of the Act. The district Court entered summary judgment against the union.

[1] The Act requires that a carrier exert every reasonable effort to settle disputes. The Act's obligations are judicially enforceable. **[2]** Congress intended the parties to work out disputes themselves with a minimum of judicial intervention. Thus, the Act does not require the appellees to disclose financial information. **[3]** However, the obligation to exert every reasonable effort to settle disputes under the Act is not identical to the obligation to bargain in good faith under the NLRA.

COUNSEL

Kenneth E. Rudd, St. Louis, Missouri, for the plaintiff-appellant.

Eugene A. Ritti, Boise Idaho, and I. Michael Greenberger, Washington, D.C., for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board, Brotherhood of Railway Carmen (the union) appeals the district court's entry of summary judgment against it in this case arising under the Railway Labor Act. The union contends that Union Pacific Fruit Express Company (Union Pacific), Union Pacific Railroad Company (UPRC), and Union Pacific Motor Freight Company (UPMFC) are required under Section 2 First of the Railway Labor Act, 45 U.S.C. §152 First (1982), to provide financial information to support Union Pacific's claim that layoffs of railroad carmen were necessary because of a decline in business. Union Pacific responds that (1) the Railway Labor Act does not authorize courts to compel pre-arbitration discovery; (2) even if the Act creates a right to discovery, the court should submit this case to an adjustment board to determine whether the parties have waived any such right; and (3) neither UPRC nor UPMFC employed any of the furloughed carmen and therefore neither should be required to disclose information.

We agree that Section 2 First of the Railway Labor Act does not require the appellees to disclose financial information in this case, and we therefore affirm.

FACTS

Union Pacific is a carrier within the meaning the 45 U.S.C. §151 First (1982). The union is a railway labor union and a representative of Union Pacific's carmen within the meaning of 45 U.S.C. §151 Sixth (1982). In 1980, Union Pacific began a series of layoffs of railway carmen at its Nampa, Idaho repair facility. The union contends that Union Pacific's layoffs amounted to an abandonment of the Nampa facility, and that furloughed Nampa carmen are therefore entitled to income protective benefits under a 1964 agreement between Union Pacific

and the carmen. Union Pacific denies that it abandoned the Nampa facility and contends that a decline in rail traffic and increased competition made the layoffs necessary. Both sides agree that this underlying dispute is a "minor dispute" under the Railway Labor Act and that it cannot be litigated in court. *See* 45 U.S.C. §153 First (i) (1982); *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986).

In 1983 and 1984, union officials asked Union Pacific to supply financial information to substantiate the claim that a decline in business caused the Nampa layoffs. Union Pacific refused to supply the requested information. The union then filed suit in district court, arguing that Union Pacific's refusal to disclose financial information violated Section 2 First of the Railway Labor Act, 45 U.S.C. §152 First (1982). The district court entered summary judgment against the union, ruling that (1) it lacked jurisdiction to grant the union's discovery request because it had no jurisdiction over the underlying contract dispute, and (2) the union had no right to discovery under Section 2 First. This appeal followed.

DISCUSSION

Section 2 First of the Railway Labor Act provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. §152 First (1982). In *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 581 (1971), the Supreme Court made it clear that Section 2 First obligations are judicially enforceable: "we think the conclus-

tion inescapable that Congress intended the enforcement of §2 First to be overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction over the dispute or prematurely releasing the parties for resort to self-help if it feels such action called for." *See also Air Line Pilots Ass'n v. Transamerica Airlines, Inc.*, 817 F.2d 510, 513-14 (9th Cir. 1987).

The union contends that Union Pacific's failure to substantiate its claim of business losses violates Section 2 First's requirement that a carrier exert every reasonable effort to settle disputes. The union's main argument for this interpretation of Section 2 First is that the language of the provision is nearly identical to the language of Section 204(a)(1) of the National Labor Relations Act (NLRA),[1] which has been interpreted to require disclosure in similar situations. In *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), the Supreme Court held that the National Labor Relations Board was justified in

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[1] Section 204(a), 29 U.S.C. §174(a), provides in relevant part:

> In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall —
>
> > (1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements.

finding that an employee had violated Sections 8(a)(5)[2] and 204(a)(1) of the NLRA by refusing to substantiate a claim that it could not afford to pay higher wages. The Court said:

> Good-faith bargaiing necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.

351 U.S. at 152-53; *see also NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966). The union argues that Union Pacific's failure to substantiate its claim of business losses in the present case should likewise give rise to a cause of action under Section 2 First.

---

[2] Section 8 of the NLRA, 29 U.S.C. §158, provides in relevant part:

> (a)It shall be an unfair labor practice for an employer —
>
> * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.
>
> * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

[1] We disagree. First, we think it is clear that the obligation to exert every reasonable effort to settle disputes under the Railway Labor Act is not identical to the obligations to bargain in good faith under the NLRA. In *Chicago & North Western, supra,* the Supreme Court cautioned that courts should be wary of drawing parallels between the Railway Labor Act and the NLRA and of expanding the scope of Section 2 First beyond cases in which a party desires not to reach an agreement:

> While we have no occasion to determine whether §2 First requires more of the parties than avoidance of "bad faith" as defined by Judge Magruder in *Reed & Prince, supra,* we note two caveats. First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes. [citation omitted] Second, great circumspection should be used in going beyond cases involving "desire not to reach an agreement," for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements.

402 U.S. at 579 n. 11. In *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 686 n. 23(1981), the Court flatly stated that "[t]he mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices."

[2] Second, we think the extensive judicial intervention that court-ordered disclosure would require is inconsistent with the history and principles of the Railway Labor Act. The Act "was the product of agreement between the carriers and the unions, based on extensive negotiation and compromise as well as decades of experience with railroad labor legislation." *Air Line Pilots Ass'n v. Texas International Airlines, Inc.,* 656 F.2d 16,

19 (2d Cir. 1981). Congress intended the parties to work out disputes themselves, with a minimum of judicial intervention. *See Chicago & North Western,* 402 U.S. at 588-91 (Brennan, J. dissenting); *see also Fechtelkotter v. Air Lines Pilots Ass'n,* 693 F.2d 899, 901 (9th Cir. 1982) (citing the Act's "strong polic[y] in favor of arbitration and against judicial intervention"). Pacific Fruit's interpretation of Section 2 First would place the courts at the heart of the bargaining process whenever either side in a railway labor dispute sought information about the other. We think Congress intended otherwise.

[3] Finally, we think it is significant that the Railway Labor Act created no administrative board comparable to the National Labor Relations Board (NLRB). When the NLRA requires a party to disclose information, the courts' role in the process is limited to reviewing NLRB disclosure orders under a deferential standard. *See, e.g., NLRB v. Associated General Contractors,* 633 F.2d 766, 770 (9th Cir. 1980), *cert. denied,* 452 U.S. 915 (1981). Under the union's interpretation of the Railway Labor Act, on the other hand, the courts would be solely responsible for administering and enforcing pre-arbitration disclosure. In the absence of clear evidence to the contrary, we are reluctant to assume that Congress intended to impose such a duty on the courts.

We conclude that the kind of court-ordered discovery sought in this case is incompatible with the aims and structure of the Railway Labor Act. We therefore affirm the district court's ruling that Section 2 First of the Railway Labor Act does not require the appellees the disclose financial information.[3]

AFFIRMED.

---

[3] Because we affirm on the ground that appellees have not violated Section 2 First, we do not reach the questions (1) whether a party may waive its rights under Section 2 First; and (2) whether and to what extent UPRC and UPMFC are subject to the requirements of Section 2 First in the present case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 86-4235
DC No. CV84-1177-R

Pacific Fruit Express and union Pacific Fruit Express Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada,

Plaintiff-Appellant,

v.

Union Pacific, Union Pacific Express Company, a corporation; Union Pacific Railroad Company; Union Pacific Motor Freight Company, a corporation

Defendant-Appellee.

ORDER

(Filed Dec. 4, 1987)

BEFORE: POOLE, FERGUSON AND CANBY, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
MAY 25 1988
CLERK

No. 87-1525

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PACIFIC FRUIT EXPRESS AND UNION PACIFIC FRUIT EXPRESS, JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,
Petitioner,

v.

UNION PACIFIC FRUIT EXPRESS COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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May 25, 1988

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QUESTION PRESENTED

Whether the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, affords railroads, airlines, and their unions the right to bring actions in federal court for the sole purpose of obtaining discovery for use in labor disputes within the mandatory and exclusive jurisdiction of railroad and airline arbitration boards.

LIST OF PARTIES

The petition for certiorari in this case properly lists all parties. Pet. 1-2. The statement required by Supreme Court Rule 28.1 listing subsidiaries and affiliates of the respondents is contained in the Appendix to this opposition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1525

PACIFIC FRUIT EXPRESS AND UNION PACIFIC FRUIT EXPRESS, JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,

Petitioner,

v.

UNION PACIFIC FRUIT EXPRESS COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Union Pacific Fruit Express Company, *et al.*, submit this brief in opposition to the petition for writ of certiorari.

PRELIMINARY STATEMENT

Pursuant to Section 3 of the Railway Labor Act ("RLA"), 45 U.S.C. § 153, disputes between railroads or airlines[1] and their unions over the interpretation or ap-

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[1] The Railway Labor Act's coverage extends to the airline industry under 45 U.S.C. §§ 181-88. See generally *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963).

plication of collective bargaining agreements are called "minor" disputes and are subject to the "mandatory, exclusive, and comprehensive system" of arbitration procedures established by the RLA. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963). The petitioner (hereinafter the "Union") contends here that the RLA affords the parties to any minor dispute the right to bring an action in the federal courts for the sole purpose of using the Federal Rules of Civil Procedure to obtain discovery for use in the subsequent arbitration proceeding. A unanimous panel of the Ninth Circuit rejected the Union's argument by concluding "that the kind of court-ordered discovery sought in this case is incompatible with the aims and structure of the [RLA]." A. 13.[2] The Union's petition for rehearing *en banc* was unanimously denied. A. 14.

The decision below accords with every other decision on this question. This Court itself, approving various lower court decisions, has expressly held that "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied." *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 353 n.17 (1978) (citing other cases). Moreover, in the only two prior cases presenting this question under the RLA—each filed by the petitioner Union, represented by the same counsel—the courts unanimously and summarily rejected the Union's attempt to obtain "court-ordered discovery" for use in railway labor arbitrations. See *Brotherhood of Railway Carmen* v. *Pacific Fruit Express Co.*, 651 F.2d 651 (9th Cir. 1981); *Burlington Northern Joint Protective Board* v. *Burlington Northern R. Co.*, 822 F.2d 810 (8th Cir. 1987). Indeed, just two months ago, this Court denied certiorari in the Eighth Circuit's *Burlington Northern*

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[2] "A. —" refers to the appendix to the petition for certiorari in this case.

Joint Protective Board case, in which the Union and its counsel filed a petition for certiorari that is virtually identical to the petition at issue here. No. 87-1177; see 108 S. Ct. 1111 (March 7, 1988).

Not only is there no merit to petitioner's claims, and no conflict among the courts, but the question itself is self-evidently unworthy of review. This is shown by the simple fact that in the 54 years in which railroad and airline arbitrations have been taking place under the Act, this is only the third case where such discovery was sought in the federal courts—and that, moreover, each of those cases was brought by the same union, represented by the same counsel, and was summarily and unanimously rejected by the courts.

COUNTER-STATEMENT OF THE CASE

The Union's "Statement of the Case" is accurate only insofar as it quotes from the decision below. Pet. 4-5. As the court of appeals said, the facts are that: (1) the underlying dispute concerns furloughs of certain railway carmen at the UPFE's Nampa facility; (2) the Union's claim is that these furloughs constitute an abandonment of the facility, thereby triggering certain labor protections for the furloughed carmen under a 1964 National Mediation Agreement (hereinafter the "1964 Agreement"); (3) the respondents' defense is that the labor protections are inapplicable here because the furloughs were caused by a decline in business, which does not trigger the labor protections; and (4) the parties agree that the dispute over the lawfulness of the furloughs under the 1964 Agreement is a "minor" dispute that is subject to the mandatory and exclusive jurisdiction of a railroad adjustment board and that "cannot be litigated in court." A. 8-9 (citations omitted).

Although the Union's Statement purports to "expand" on the facts set out in the decision below—through unsupported assertions—its Statement actually omits the

additional undisputed evidence adduced below. For example, the Union fails to mention the uncontradicted evidence below concerning the unprecedented nature of its discovery request. Although the Union and the UPFE (or its predecessor) have been operating under the 1964 Agreement for almost 25 years, the Union in the over 400 other grievances between the parties has made a comparable demand for confidential information only once, and in that case, as explained below, the Ninth Circuit summarily rejected the availability of pre-arbitration discovery. (Ex. 67, 74, 91; D.R. 67, 74, 91); see pp. 6-7 *infra*.[3] The Union also fails to note that the 1964 Agreement at issue here has a nationwide scope, affecting 71 railroads and six shop craft unions, and that, under the consistent industry-wide practice, the type of detailed proprietary information sought here by the Union is neither demanded by unions nor furnished by carriers, either in connection with grievances under the 1964 Agreement or otherwise. (Ex. 68, 74, 91-92; D.R. 68, 74, 91-92.)

The Union also does not inform the Court that procedures for handling minor disputes are set forth in the RLA and do not provide for pre-arbitration discovery. 45 U.S.C. §§ 153 First (i)-(k), 153 Second. Nor does it acknowledge that RLA procedures may be modified by agreement of any railroad or airline and its unions through collective bargaining. See 45 U.S.C. § 152 Sixth; pp. 13-14 *infra*. Indeed, the railroad and union signatories to the 1964 Agreement *did* agree therein to add certain procedures not specified in the RLA, including an obligation on the railroads to disclose to the unions certain kinds of data.[4]

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[3] "Ex. —" refers to the Union's excerpts in the court below and "D.R. —" refers to the designated record below.

[4] For example, as the Union conceded below, Section 4 of the Article I of the 1964 national agreement expressly provides that where employees are furloughed under specified circumstances the railroad

In this regard, and even more importantly, the Union does not explain that the general procedures added by the parties in the 1964 Agreement, although not requiring formal discovery in this case, have the indirect effect of requiring the railroad to furnish relevant evidence. In particular, Section 11 of Article VI limits the railroad's presentation to the adjustment board to evidence previously presented to the union during pre-arbitration conferences. (Ex. 22; D.R. 22.) Moreover, Section 3 of Article I shifts the burden of proof concerning job protection from the union challenging the railroad's action, where the burden normally would lie, to the railroad itself. (Ex. 9; D.R. 9.) Taken together, these provisions require a railroad, if it is to meet its evidentiary burden under the 1964 Agreement, to produce relevant information prior to arbitration.

Finally, the Union also fails to tell this Court that, pursuant to the provisions just discussed, the UPFE *did* provide the Union with a substantial amount of information which confirmed that the employees were not entitled to protective benefits. (Ex. 92, 124-28; D.R. 92, 124-28.) Specifically, the UPFE provided the Union with detailed information concerning quarterly car loadings, car mileage, car repairs, the reasons for the Nampa furloughs, and the business plans of the UPFE concerning future repair operations. *Id.* Accordingly, the specter raised by the Union of an employer obstinately refusing to provide relevant information is simply inapplicable here.

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must provide "a *full disclosure of all facts and circumstances* bearing on the proposed discontinuance of positions." (Ex. 9; D.R. 9) (emphasis added). Similarly, Section 2 of Article II provides that "[i]f the carrier decides that * * * it is necessary to subcontract work of a type currently performed by the employes, it shall give the general chairman of the craft or crafts involved notice of intent to contract out and the reasons therefor, *together with supporting data*." (Ex. 17; D.R. 17) (emphasis added).

REASONS FOR DENYING THE PETITION

1. There is not a single case in conflict with the decision below.

The decision below accords with the well-settled general rule that parties to an arbitration are not entitled to seek discovery for that arbitration in the federal courts. See, *e.g.*, *Corcoran* v. *Shearson/American Express Inc.*, 596 F. Supp. 1113, 1117-18 (N.D. Ga. 1984); *Levin* v. *Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 880-81 (E.D. Pa. 1976), *appeal dismissed*, 549 F.2d 795 (3d Cir. 1977); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 565-67 (S.D. Miss. 1976). The courts have reasoned that discovery runs counter to the underlying purposes of arbitration. See, *e.g.*, *Burton* v. *Bush*, 614 F.2d 389, 391 (4th Cir. 1980) ("such limitations [on discovery] are in keeping with the policy underpinnings of arbitration—speed, efficiency, and the reduction of litigation expenses"). Indeed, relying on decisions like these, this Court expressly held in *Oppenheimer Fund, Inc.* v. *Sanders, supra*, 437 U.S. at 353 n.17, that "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied."

As noted above, the specific question whether parties before a *railroad* adjustment board have a right to obtain discovery in the federal courts for use in the subsequent arbitration has heretofore only been raised on two prior occasions in the fifty-plus years since the passage of the RLA. On both occasions, each of which arose in the past several years, the issue was raised by the petitioner Union, represented by its counsel in this case, and in both instances its claim for pre-arbitration discovery was unanimously and summarily rejected by the courts. *Brotherhood of Railway Carmen* v. *Pacific Fruit Express Co.*, 651 F.2d 651 (9th Cir. 1981); *Burlington Northern Joint Protective Board* v. *Burlington Northern R. Co.*,

822 F.2d 810 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (March 7, 1988).

The Ninth Circuit's decision in *Pacific Fruit Express* involved not only the same union and the same union counsel, but also the predecessor of the same carrier and the same labor agreement that are involved in this case. There the Company decided to close a repair facility and transfer the employees to other company facilities. 651 F.2d at 652. The Carmen's local filed suit, charging that the labor agreement had been violated. It sought both an injunction against the transfer and discovery for use in processing its grievance. The defendants argued that the case presented a minor dispute and hence that the entire case had to be resolved by a railroad arbitration board. The district court agreed and dismissed the case in its entirety. *Id.*

On appeal, the Ninth Circuit first rejected the Union's argument that the case involved a "major" rather than a minor dispute. 651 F.2d at 652. The Court then turned to the Union's second, separate argument that the district court's dismissal had "denied them an opportunity for discovery." *Id.* at 653. The Ninth Circuit specifically rejected the Union's argument that it was entitled to discovery and instead affirmed the district court's decision "to leave the resolution of the dispute to the mediation procedures agreed to by the parties in their [1964 Agreement]." *Id.*

The facts of the Eighth Circuit's decision in *Burlington Northern Joint Protective Board, supra*, are equally close if not closer to those in this case. In that case, another committee of the Union, again represented by the same counsel, sought an injunction against the abolition of various carmen positions on the theory that the Burlington Northern was violating the ICC's so-called *New York Dock* labor protective conditions. See generally *New York Dock Railway-Control-Brooklyn Eastern*

District, 360 I.C.C. 60 (1979). At the same time, the Union brought a separate count seeking discovery from the Burlington Northern concerning furloughs of 67 Burlington Northern carmen. The district court held, first, that the dispute over the *New York Dock* conditions had to be submitted to arbitration rather than being pursued in the courts. See 822 F.2d at 811-12. The district court then went on to dismiss the union's request for pre-arbitration discovery, relying on this Court's decision in *Oppenheimer*, *supra*, to support its conclusion that it had no authority to compel discovery with respect to a factual dispute over which it lacked jurisdiction. *Id.* at 812. On appeal, the Eighth Circuit unanimously affirmed the district court in all respects. The Union's petition for rehearing and suggestion for rehearing *en banc* were also denied without a single dissenting vote. This Court, based on a certiorari petition that is virtually identical to the petition here, denied certiorari on March 7, 1988. See pp. 2-3 *supra*.

In short, the decision below represents the third case in which the Union's claimed right to use federal discovery rules for railroad arbitrations has been unanimously rejected by a court of appeals. Indeed, petitioner's theory has been rejected by every judge to examine it. Not only has the Union lost each district court decision and each court of appeals decision unanimously, but it did not get a single vote for *en banc* review from either the Eighth or Ninth Circuit.

2. Neither the language nor the legislative history of § 2 First of the RLA suggests that Congress intended to create a right to court-ordered pre-arbitration discovery.

The Union's argument that the RLA affords federal courts with jurisdiction to oversee pre-arbitration discovery rests entirely on § 2 First of the RLA. That provision, however, simply requires carriers and unions "to

exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier * * *." 45 U.S.C. § 152 First. Even the Union does not contend that this general language discloses a congressional purpose to compel pre-arbitration discovery. Nor does the Union contend that the legislative history of § 2 First—or of any other part of the RLA—shows that Congress meant such a right to be recognized.

Instead, the union contends that in *Chicago & North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570 (1971), this Court put a gloss on § 2 First that gives rise to a specific obligation to disclose confidential business information for use in railroad and airline labor arbitrations. But as the Ninth Circuit recognized below (A. 12), *Chicago & North Western* offers absolutely no support for the Union's position here. *Chicago & North Western* simply holds that the legal obligations created by § 2 First are judicially enforceable—a proposition with which the respondents have no quarrel. The issue presented here is not whether § 2 First is enforceable, but whether its terms disclose a congressional intent to compel pre-arbitration discovery. Nothing in *Chicago & North Western* suggests that they do. To the contrary, as the Ninth Circuit stressed in its decision below (A. 12), this Court was at pains in *Chicago & North Western* to emphasize that when construing § 2 First, "great circumspection should be used in going beyond cases involving a 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579 n.11. Here, the Union has not alleged that the UPFE's conduct in any way reflects a "desire not to reach an agreement" concerning the furlough issue. *Chicago & North Western* thus strongly implies that in asking this Court to regulate employer conduct falling

far short of a "desire not to reach an agreement," the Union is asking for § 2 First to be given a scope that Congress did not intend it to have.

The conclusion that § 2 First was not meant, and cannot be read, to imply a right to court-ordered discovery is also reinforced by the absence of any prior case finding such a right in the 50-plus years since enactment of the RLA. As this Court said in rejecting an analogous request for an unprecedented statutory construction:

> "The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act * * * was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-71 (1959).

3. There is no basis for incorporating NLRA pre-arbitration discovery rules into the RLA.

Neither is the Union's claim advanced by the fact that a right of pre-arbitration discovery has been recognized under the NLRA. Contrary to the Union's suggestion (Pet. 10-12), the right to pre-arbitration discovery under the NLRA is principally based *not* on 29 U.S.C. § 174(a)(1), whose language parallels § 2 First of the RLA, but rather on 29 U.S.C. § 158(a)(5), which requires employers to bargain in good faith with their employees' representatives. See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967) (relying solely on § 8(a)(5)). The latter provision has no counterpart in the RLA. Even if the NLRA right to pre-arbitration discovery were based on language identical to § 2 First, however, the Union's argument would fail because it disregards the fundamental differences between the RLA and the NLRA. As the Ninth Circuit recognized below (A. 12), this Court explicitly cautioned in *Chicago & North Western* itself that parallels between § 2 First and the NLRA's duty to

bargain in good faith "should be drawn with the utmost care *and with full awareness of the differences between the statutory schemes.*" 402 U.S. at 579 n.11 (emphasis added). See also, *e.g.*, *Trans International Airlines, Inc.* v. *International Brotherhood of Teamsters*, 650 F.2d 949, 959 (9th Cir. 1980). Here, the fundamental differences between the two statutes defeat the analogy offered by the Union, because the RLA and the NLRA differ in at least four respects that bear directly on the Union's claim for court-ordered pre-arbitration discovery.

First, Section 3 of the RLA, 45 U.S.C. § 153, establishes its own specific procedures for resolving contract disputes, and they do not contemplate pre-arbitration discovery. See p. 4 *supra*. This Court has emphasized that these statutory grievance procedures constitute "a *mandatory, exclusive, and comprehensive* system for resolving grievance disputes." *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963) (emphasis added); see also *Gunther* v. *San Diego & A. E. Ry. Co.*, 382 U.S. 257, 263-64 (1965). The NLRA, in contrast, does not contain any similar "comprehensive" set of express grievance resolution procedures. See, *e.g.*, *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). The Union is therefore asking this Court to read the general language of § 2 First of the RLA in derogation of the exclusive authority specifically conferred upon arbitration boards in Section 3 of the RLA. Moreover, it asks this Court to do so by following precedents under a different statute when that statute neither requires arbitration or enunciates arbitration procedures.

Second, as the court below noted (A. 12-13), an essential corollary to the exclusive and comprehensive nature of the arbitration machinery created by Congress in § 3 of the RLA is the extremely restricted role of the courts in the resolution of arbitrable minor disputes. In

this regard, this Court has made it clear that, "[n]ot only has Congress thus designated an agency [*i.e.*, the railroad adjustment board] peculiarly competent to handle [minor disputes] * * *, but * * * it also intended to leave a minimum responsibility to the courts." *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946). Indeed, "Congress considered it *essential* to keep * * * 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added). Accordingly, as the Ninth Circuit held below, opening the federal courts for discovery as to matters pending before railroad arbitration boards would be contrary to one of the RLA's central policies:

> "Congress intended the parties to work out disputes themselves, with a minimum of judicial intervention. *See Chicago & North Western*, 402 U.S. at 588-91 (Brennan, J. dissenting); *see also Fechtelkotter* v. *Air Lines Pilots Ass'n*, 693 F.2d 899, 901 (9th Cir. 1982) (citing the Act's 'strong polic[y] in favor of arbitration and against judicial intervention'). [The union's] *interpretation of Section 2 First would place the courts at the heart of the bargaining process whenever either side in a railway labor dispute sought information about the other. We think Congress intended otherwise.*" A. 13 (emphasis added).

Third, the Ninth Circuit also found it "significant that the [RLA] created no administrative board comparable to the [NLRB]." A. 13. This distinction was critical in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), where this Court refused to import NLRA secondary-boycott principles into the RLA in part because "[e]ven if the task of adapting the NLRA's principles to railway disputes could be managed and implemented by an agency with administrative expertise, * * * Congress has invested no agency with even colorable authority to perform this function." 394 U.S. at 391-92. Here, the NLRB has far greater institutional

competence to resolve discovery claims under the NLRA than federal courts would have to resolve comparable claims under the RLA.[5] Indeed, in its only case affirming NLRB-ordered pre-arbitration discovery under the NLRA, this Court stressed that "[t]he relationship of the Board to the arbitration process is of a quite different order" than the relationship of the federal courts to that process. *NLRB* v. *Acme Industrial*, *supra*, 385 U.S. at 436.[6] Thus the *Acme Industrial* case, in and of itself, evidences this Court's hesitancy to have federal courts handle discovery disputes pertaining to arbitral matters over which those courts have no jurisdiction.

Finally, the Union's attempt to equate the RLA and the NLRA ignores § 2 Sixth of the RLA, which expressly provides that "nothing in this chapter [the RLA] shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." 45 U.S.C. § 152 Sixth. In *Edwards* v. *St. Louis-San Francisco R. Co.*, 361 F.2d 946, 953-54 (7th Cir. 1966), the Seventh Circuit held that § 2 Sixth affords railroads, airlines and their unions the right to create procedures for resolution of minor disputes through the collective bargaining process. (Indeed, as we have shown above,

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[5] When Courts of Appeals are called on to review NLRB decisions concerning the NLRA duty to disclose information, their task is not to decide *de novo* whether § 8(a)(5) has been violated, but solely to decide whether the NLRB's decision is supportable under a "deferential standard of review" in which the NLRB's decision is accorded " 'great weight.' " *Salt River Valley Water Users' Ass'n* v. *NLRB*, 769 F.2d 639, 641-42 (9th Cir. 1985).

[6] As a practical matter, moreover, because many pre-arbitration discovery claims under the NLRA are resolved finally at the administrative level, relatively few such claims reach the courts through actions to enforce or review the NLRB's decisions. Under the RLA, in contrast, no administrative agency will screen the claims for pre-arbitration discovery that will be put forward by unions seeking business information from their members' employers. The courts will thus be forced to bear the full weight of a new body of litigation.

the 1964 Agreement itself represents just such an agreement in that the parties agreed to certain supplemental procedures to assure that each party had necessary information pertaining to a dispute. See pp. 4-5 *supra.*) The NLRA, by contrast, contains no provision comparable to § 2 Sixth.[7] Accordingly, while supplemental grievance procedures under the NLRA must be implied from the statute, the RLA leaves their formulation to the parties.

4. Unions are not prejudiced by a lack of court-ordered pre-arbitration discovery.

The Union's petition is replete with conclusory claims that if pre-arbitration discovery is denied, the Union and other labor organizations in its position will be unable to carry out their statutory duties of representing their members in the RLA grievance process. Those claims are belied by a single fact: it has never been the practice in the railroad industry for unions to seek or for railroads to provide the kind of information sought in this case, and no court in the 54-year history of the RLA has ever held that the RLA entitles unions to such discovery. See pp. 3-4 *supra.* If court-sponsored pre-arbitration discovery were genuinely necessary for the general processing of grievances under § 3 of the RLA, unions would have sought such discovery as a matter of course and courts would have been presented with repeated requests for orders compelling disclosure of information.

Moreover, if the circumstances of a particular collective bargaining agreement make it unusually important for one side to have access to information in the posses-

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[7] Indeed, § 10(a) of the NLRA expressly provides that the NLRB's jurisdiction to sanction unfair labor practices, including the refusal to bargain in good faith, "shall not be affected by any other means of adjustment * * * that has been or may be established by agreement, law, or otherwise * * *." 29 U.S.C. § 160(a).

sion of the other side, the parties are free to bargain for disclosure as part of their overall contractual agreement. See pp. 13-14 *supra*. In this case, as shown above, the parties did provide by contract for limited disclosure obligations in connection with the 1964 Agreement—but not for the kind of disclosure sought by the Union here. See pp. 4-5 *supra*. In demanding pre-arbitration discovery in this case, the Union is asking this Court to rewrite the terms of a bargain that labor and management voluntarily reached almost 25 years ago and have not since disturbed.

Finally, it must be kept in mind that a rule denying pre-arbitration discovery is a two-way street. In some cases, a railroad or an airline will have an interest in discovering information in the possession of the union for use in connection with an upcoming arbitration. In those cases, if the union is not contractually obligated to disclose the information, whatever burden may accrue from not allowing discovery falls on the employer rather than on the union. Thus, even if a rule against pre-arbitration discovery is assumed to create occasional burdens, those burdens by no means fall exclusively on unions.

5. A right to court-ordered discovery for railroad and airline arbitrations would burden the federal courts.

If a right of pre-arbitration discovery is recognized, the principal practical result will not be a righting of supposed wrongs against unions, but instead a wave of burdensome litigation for the courts. During 1981 alone, approximately 31,000 grievances were filed by railroad unions or carriers. (Ex. 162; D.R. 162.) Under the Union's theory, the parties to each of those 31,000 cases would have had the right to make a sweeping demand for confidential information and documents and to seek to enforce that demand in court if discovery were not forthcoming. It is only possible to speculate how many of

those grievances would have resulted in discovery litigation if a right to pre-arbitration discovery were recognized, but a significant percentage of grievances filed with railroads are ultimately pursued all the way through the minor dispute process to decision by a railroad adjustment board, and many of those grievances could reasonably be expected to lead to collateral discovery proceedings in federal court. See, *e.g.*, National Mediation Board, *Forty-Ninth Annual Report* 44-46 (1983) (approximately 6600 minor disputes processed to decision by adjustment boards). And, as noted above, the courts will not enjoy the luxury of having an administrative agency like the NLRB to act as a buffer for the handling of these discovery controversies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 25, 1988

APPENDIX

APPENDIX

The following companies are affiliated with one or more of the respondents, either as corporate subsidiaries, parents, or other corporate affiliates:

Alameda Belt Line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company
Chicago & Western Indiana Railroad Company
Chicago Heights Terminal and Transfer Railroad Company

Delta Finance Company, Ltd.
Denver Union Terminal Railway
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson Railway Company
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Railroad Company
Missouri Pacific Truck Lines, Inc.
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Overthrust Pipe Line, Inc.
Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe Line, Inc.
Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Pueblo Union Depot and Railroad Company
Quality Aggregate & Company

R M Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Southern Illinois and Missouri Bridge Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Land Resources Corporation
Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industrial Development Company
Upland Industries Corporation
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited
Winton Coal Company
WPX Freight System, Inc.